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IN THE

Supreme Court of the United States

October Term, 1963.

No. 261

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

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To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

The petitioner, Harry J. Alker, Jr., respectfully prays your Honorable Court for allowance of a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania entered March 19, 1963, affirming "*per curiam*" the judgment of the Orphans' Court of Montgomery County, Pennsylvania, and in support thereof, submits the following data and argument:

OPINIONS BELOW.

The "per curiam" opinion of the learned Supreme Court of Pennsylvania, filed March 19, 1963, is not yet reported in — Pa. — (1963).

The opinion of the learned Orphans' Court of Montgomery County per Taxis, P. J. is not reported.

JURISDICTION.

(I) The judgment of the learned Supreme Court of Pennsylvania was entered March 19, 1963.

(II) There was no order for rehearing, but the time for filing Petition for Certiorari was extended by this Court to June 27, 1963. ~~to~~ ~~date~~ ~~to~~ July 8 1963

(III) The statutory provision conferring jurisdiction on your Honorable Supreme Court to review said judgment and decision by Certiorari is that contained in the Act of Congress of June 25, 1948, C. 646, 62 Stat. 929, reading thus:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: . . . (3) By writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised, under the United States"; (28 U. S. C. A. #1257(3)).

QUESTIONS PRESENTED FOR REVIEW.

I. After an adjudication absolute by the Orphans' (probate) Court and distribution thereunder, is not the property thus awarded and distributed (regardless of the temporary possession of a stock certificate elsewhere in corporate liquidating trustees) vested in the living distributee so that any taking thereof, without notice and opportunity to defend, is a deprivation of property without "due Process of Law" in violation of the 5th and 14th Amendments of the U. S. Constitution?

II. Where administrators d.b.n.c.t.a. claim recoupment of an alleged Federal Estate Tax penalty against a living distributee and his vested property, do not the "Due Process" clauses of the 5th and 14th Amendments, U. S. Constitution, require that notice be given, and hearing afforded to such living distributee to defend against such alleged penalty in the U. S. Tax Court before such distributee can be made liable therefor?

III. Is not the Pennsylvania Estate Tax Proration Act of July 2, 1937, P. L. 2762, 20 P. S. #844, allowing proration of estate taxes paid by fiduciaries against heirs and legatees, without requiring notice by such fiduciaries to, and opportunity for a hearing by, such heirs and legatees before such tax liability is imposed and paid, unconstitutional and void as a deprivation of property without Due Process of Law in violation of the 5th and 14th Amendments, U. S. Constitution?

IV. Where the U. S. Tax Court finds "no Federal Estate Tax deficiency due", and also fails to find any "fraud," is it not illegal, because violative of the United States Internal Revenue Code and of the "Due Process" clauses of the United States Constitution, for Administrators to stipulate and pay an alleged "fraud penalty" without giving notice and a hearing-opportunity to the vested distributee to be charged therewith?

V. Is not Section 3612(d)(2) of the U. S. I. R. Code, which derives from R. S. Section #3176 and dates from 1864 (52 years *before* first enactment of a Federal Estate Tax in 1916), which dealt only with fraudulent returns of goods, wares, and merchandise, and which never, either specifically or by implication, imposed penalty of "50% of tax" for "fraud" in estate tax returns, so wholly inapposite and inapplicable as to render the "one-half of 50% tax penalty", herein paid by Administrators, illegal and uncollectible by proration or recoupment against legatees?

U. S. CONSTITUTION INVOLVED.

Fourteenth Amendment.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE.

Winfred S. Hurst died November 7, 1949, leaving a will dated September 4, 1944, appointing Harry J. Alker, Jr. as his executor and trustee of two separate trust funds thereunder. The decedent, out of his residuary estate, firstly, created said two trust funds, one of which was in favor of his mother, in the amount of $100,000.00 and which also gave her power of appointment of $25,000.00; secondly, he bequeathed substantial amounts of money to various individuals, three of whom are residuary legatees; and, thirdly, he divided, equally, the remaining balance of his said residuary estate among eight persons, one of whom being Harry J. Alker, Jr.

Harry J. Alker, Jr. qualified as such executor and, on February 4, 1951, filed the estate's Federal tax return; and a tax of $112,723.40 was paid thereon.

On June 22, 1955, after diver[illegible]ceptions had been taken, an adjudication of said executor's First and Final account was filed. On August 17, 1955, after disputes had been adjudicated by written agreement, a supplemental and definitive adjudication embodying said agreement was de-

creed by Judge VanRoden (specially presiding) in which one-eighth of the stock balance for distribution, namely 162½ shares of Dublin Hosiery Mills, Inc. was awarded to the appellant.

On January 3, 1956, distribution was made in accordance with said adjudication awards, and 162½ shares of "Dublin Mills" stock were transferred to and registered in the name of, Harry J. Alker, Jr., distributee, and petitioner herein. Later, custody of the certificate for said shares of stock, however, was temporarily lodged, pursuant to the agreement aforesaid, with the escrow agents.

On April 12, 1956, petitioner was removed as executor of this estate by Judge VanRoden in a decree which recited: "and this removal is not made by reason of any dereliction of duty of any sort by the said Harry J. Alker, Jr." Shortly thereafter, Russell C. Pullinger and Gilbert A. Sitler were appointed administrators d.b.n.c.t.a.

While Harry J. Alker, Jr., was executor, the Commissioner of Internal Revenue determined that there was a deficiency due by said estate, which said executor protested, and filed a petition in the Tax Court of the United States under Docket No. 52266. After said executor was succeeded by said administrators, the Commissioner of Internal Revenue filed amended answers in said action, alleging that petitioner had not included as an asset, a certain sum of $35,000.00 in the estate return, which petitioner claimed did not belong to the testator.

The said administrators and their counsel held several conferences with personnel of the Internal Revenue Service, endeavoring to settle said allegations as well as several others, including claimed credits for commissions by petitioner as such executor, counsel for said executor, disallowed commissions to brokers on sales of real estate, evaluation of estate assets, and the counsel fee of administrators' counsel.

As a result of these conferences, on March 13, 1959, without any interim or other notice to petitioner, and with-

out having afforded petitioner any opportunity to be heard in defense to any alleged civil "fraud" the said administrators stipulated with the Commissioner of Internal Revenue for entry of decision by the Tax Court of the United States of a 50% addition to the tax of $28,180.78, purportedly under Section 3612(d)(2) of the Internal Revenue Code of 1939, without however stipulating or admitting any "fraud" and without said Tax Court finding or deciding any "fraud".

The Tax Court, per Murdock, C. J., on March 20, 1959, without inquiring into the validity of said "half-penalty" and without finding any "fraud" to support it, entered a decision, to wit: "Pursuant to written stipulation signed by counsel for the parties in the above named case and filed with the Court on March 13, 1959 at Washington, D. C. it is Ordered and Decided: That there is no deficiency in estate tax due from, nor overpayment due to, the petitioner. That without considering the assessment made subsequent to the issuance of the deficiency notice, there is a deficiency in addition to tax under Sections 3612(d)(2), I. R. C. 1939, due from the petitioners, in the amount of $28,180.78."

On July 17, 1959, the said administrators filed in the Orphans' Court of Montgomery County, Pennsylvania, their two petitions involved herein; one to apportion said penalty of $28,180.78 against petitioner, the other to compel the liquidating trustees of "Dublin Mills" to deliver to them the petitioner's said vested stocks, both of which requests were granted by the said Orphans' Court.

The petitioner appealed from the said Orphans' Court's opinion and decision to the Supreme Court of Pennsylvania, maintaining that the lower Court erred in apportioning said penalty against petitioner; that such apportionment was not authorized by law, that it was a violation of petitioner's rights under the 5th and 14th Amendments of the Constitution of the United States and of the Constitution of the State of Pennsylvania as to due process of law and equal protection of the law; and by mistake of fact and law and

use of the wrong Federal statute in arriving at a penalty tax, if any such should have been found, which is denied by petitioner.

The Supreme Court of Pennsylvania, on March 19, 1963, in a "per curiam order" without opinion upheld the lower Court's opinion, wherefore this petition for certiorari.

The decedent, Winfred S. Hurst, lived at 525 Willow Grove Avenue, Wyndmoor, Montgomery County, Pennsylvania, with his mother, Annie E. Hurst, who survived him. Mr. Hurst was a well-established certified public accountant in the City of Philadelphia, well versed in Federal tax matters, and was very friendly with petitioner, as well as being represented by petitioner, then a practicing lawyer in Philadelphia and Montgomery counties, Pennsylvania. It is believed, however, that Mr. Hurst drew his own last will. This friendship between decedent and petitioner was recognized and proven by decedent willing and bequeathing to petitioner a 1/8th share of his residuary estate as well as appointing him executor of his will and trustee of said trusts as provided in his last will.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The $28,180.78 proration judgment against petitioner's vested property, entered by the lower Court despite respondents' lack of notice to petitioner and without a hearing opportunity for petitioner to defend against it before respondents' stipulation and payment thereof, is a taking and deprivation of petitioner's property without "Due Process" in violation of the 5th and 14th Amendments, U. S. Constitution.

2. The Pennsylvania Estate Tax Proration Act of July 2, 1937, P. L. 2762, 20 P. S. §844, allowing estate tax proration judgments to be entered against legatees in favor of Fiduciaries without requiring prior notice and a hearing

opportunity to such legatees before said tax liability is imposed, is unconstitutional and void as an invalid deprivation of property without "Due Process of Law" in violation of the 5th and 14th Amendments, U. S. Constitution.

3. The respondents' (administrators') payment of an alleged "one-half of 50% fraud-penalty" by their stipulation and voluntary submission to a United States Tax Court judgment therefor, when said Tax Court found "no Federal Estate Tax deficiency due" and also failed to find "any fraud", was invalid and unauthorized by Section 3612(d)(2) U. S. I. R. Code (governing only excise taxes on wares and merchandise) and hence is illegal and uncollectible by proration, recoupment, or otherwise.

ARGUMENT.

(a) Both the Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania, have entered against petitioner herein a $28,180.78 judgment in favor of respondents, the administrators, d.b.n.c.t.a. of this Winfred Hurst Estate, on the latters' mere petition. This was done despite the fact that said Administrators admitted that they had voluntarily incurred that liability by stipulating with the United States Internal Revenue Service for an alleged compromise "one-half of the 50% fraud penalty" supposedly imposed by Section 3612(d)(2) of the United States Internal Revenue Code.

Respondent-administrators also admitted (pp. 51a, 52a of the printed Record, and page 199 of the original record) that they had never given petitioner, Alker, any notice of their said proceedings in United States Tax Court, nor had they afforded him any opportunity to be heard thereon before such alleged liability was imposed therein.

The Pennsylvania Orphans' Court in its opinion (Record p. 85a), affirmed per curiam by the Supreme Court of Pennsylvania, said:

> "It cannot earnestly be contended that the successor administrators . . . should have turned to him or attempted to satisfy him in their solution."

Petitioner respectfully insists that "satisfaction with respondents' solution" was not the point involved. On the contrary, the gist of their invalid action (now affirmed by both Pennsylvania Courts below) was their *complete disregard* of the *minimal requiremnts* of *Due Process of Law*, their failure and refusal to give any notice whatever to petitioner of their action, and their *utter neglect to afford* petitioner any *opportunity to be heard* in that Court *before* the liability for $28,180.78 could be imposed by a judgment of any kind in any Court. It is no answer to

this neglect for respondents now to say that petitioner was duly heard in the Pennsylvania Orphans' Court below, since by that time the liability, if valid at all, had already attached by entry of the United States Tax Court judgment without notice to petitioner or hearing thereon. The alleged "hearing" in the Pennsylvania Orphans' Court below was nothing more than the hollow mockery of the old adage about "locking the barn door after the horse is stolen." In the Courts below the liability, if valid at all in United States Tax Court, had already been imposed and paid by the Administrators, and these respondents were there asking said Pennsylvania Courts merely to "rubber stamp" the *functus officio* entered without Due Process to petitioner in the United States Tax Court.

If illustration of so basic a proposition be needed it will be found in the language of the honorable Supreme Court of Pennsylvania, speaking through Mr. Justice Stern, *In re Gelli's Estate*, 340 Pa. 561 (1941), 17 A. 2d 899, at page 903, as follows:

> "Nevertheless, when the third account was filed, defendant ignored plaintiff's claim, and, instead of notifying them and leaving the problem to the court for solution, *it not only undertook to decide* the question *on its own responsibility, but unfortunately decided it erroneously;* it represented to the court that one-half of the Edward Roberts share should be awarded to the Meigs children, which, accordingly the court did, not knowing, of course, that the parties opposed to such a distribution had not been notified of the proceedings and that their absence therefore did not imply acquiescence in making the award as prayed by defendant. *Under such circumstances the distribution, as far as plaintiff's rights are concerned, was wholly void.* Comm. v. Green, 4 Whart. 531, 568; McKee v. McKee, 14 Pa. 231 *; Comm. v. Rogers, 53 Pa. 470, 475; Thompson v. Stitt, 56 Pa. 156, 160; Richards v. Rote, 68 Pa. 248, 252; * * * In Re Shugars' Estate, 312 Pa. 472,

167 A. 567; Krug v. Keller, 8 Pa. Super. 78, 82. In the Shugars case, 312 Pa. at pages 476, 477, 167 A. at page 569, the court said: "Because of *the failure to give the actual notice required* by statute, *the decree* ordering distribution *was void as to appellant's claim. It could have no possible effect upon it. Such notice was indispensably necessary to give jurisdiction, and, without such notice and an opportunity to appellant to be heard, the decrees of the court were absolutely void.*" (Emphasis ours.)

In the footnote to the *McKee* case (*), *supra*, this Court emphasized:

> "*The anxiety of the lawmakers* to secure to defendants a day in court, after due notice, so sedulously manifested, *is but in accordance with the principle that before the rights of an individual can be bound by a judicial sentence, he shall have notice of the proceedings against him. This is announced to be an axiom of natural justice and of universal application,* by Marshall, C. J., in the Mary, 3 Peters' C. R. 312." (Emphasis ours.)

Law Lacks "Due Process".

(b) The Pennsylvania Estate Tax Apportionment Act of July 2, 1937, P. L. 2762, 20 P. S. 844, applicable to and actually applied in this case, is unconstitutional and void because it fails utterly to provide for the giving of notice or for affording an opportunity to be heard to the legatees and heirs against whom said Act authorizes such proration judgments to be entered. Obviously, the only kind of notice and opportunity to be heard that could ever be worth anything to this petitioner, or to any other legatee, or that might even be regarded as any kind of minimum compliance with said "axiom of natural justice and of universal application" in our United States and State constitutions is that which these respondents did not give to petitioner

while they were seeking to impose a liability in the United States Tax Court that they, admittedly, intended to demand, and did demand, of this petitioner in the Pennsylvania courts below. As the Pennsylvania Supreme Court so aptly said in the *Galli Estate, supra*, "They not only undertook to decide the question on their own responsibility, but unfortunately decided it erroneously." We therefore respectfully suggest disagreement with the learned Orphans' Court below by "earnestly contending here", as was done also below, that the "successor administrators" (respondents herein) ought most certainly to have given this petitioner notice and an opportunity to be heard in the United States Tax Court in direct opposition to their alleged "laborious great responsibility and problems" there. The respondent had no right voluntarily to make an independent erroneous commitment for a $28,000 liability intended to be assessed against petitioner, in his absence without notice and hearing thereon, and then demand that a Court relieve them of their neglect to afford "Due Process".

> "Extra-official or casual notice, of a hearing granted as a favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which the United States Constitution, 14th Amendment, requires." *Coe v. Armour F. Works*, 237 U. S. 413, 35 Sup. Crt. Rep. 625, 59 Law Ed. 1027.

This is especially true where, as here, the Pennsylvania Orphans' Court below to which respondents thereafter applied for such unwarranted relief was wholly without jurisdiction to grant such applications.

In *Forry's Estate*, 246 Pa. 448 (1914), 92 A. 697, the Pennsylvania Supreme Court held "Where no application was made to open a decree confirming the audit of administrators' accounts, the Orphans' Court was without jurisdiction . . . to re-distribute the estate."

In *Washington, ex rel., Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Crt. Rep. 535, 56 L. Ed. 863, this honorable United States Supreme Court held:

> "The *hearing* which must precede the taking of property is not a mere form but the *owner must have the right* to secure and present evidence material to the issue under investigation, must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but also to give legal effect to what has been established."

These fundamental and salutary requirements were never accorded to your petitioner in this estate tax (penalty) controversy. Hence, this Court's writ of certiorari to review such an erroneous judgment below ought to be granted.

As to section 844 of the Estate Tax Apportionment Act of 1937 (20 P. S. 844) it is contended by petitioner that this section was designed only to operate as between specific legatees and beneficiaries of the residue by charging the former with their fair proportionate share of estate taxes in relief of latter upon whom brunt of the entire tax burden would otherwise fall. That it was intended to achieve equality of tax contribution and to relieve distributees from inequalities resulting from imposition of the Federal estate tax. It is further contended that the said provision of the 1937 Act was not designed or intended by the legislature to be used in a matter of the instant kind. That it is entirely foreign to the purpose of the legislators to suppose that the equality which they desired to create could be thwarted by an arbitrary act of a Court in apportioning against solely one party or person of several jointly and severally liable therefore.

See *Edwards Estate*, 377 Pa. 606, 105 A. 2d 312;
Wahr's Estate, 370 Pa. 382, 88 A. 2d 417;
Mack's Estate, 74 Pa. D. & C. 385.

In further support of petitioner's contention that said penalty or addition to the tax should not be solely apportioned against petitioner, it is claimed that the decedent himself did not desire the apportionment act to control in his estate. He makes the following provisions in his last will, to wit:

Paragraph "Fifth"—"All the foregoing legacies shall be free and clear of all transfer, legacy, succession, estate and inheritance taxes, and any such taxes thereon shall be paid by my Executor out of the principal of my residuary estate."

Sixth (a)—"* * * The income and principal payable to my mother and applicable to her support shall be free and clear of all transfer, inheritance, legacy, estate and succession taxes, and all such taxes thereon shall be paid by my Executor or Trustee out of the principal of my residuary estate."

Sixth (b)(7)—"The foregoing legacies and bequests shall be free and clear of all transfer, legacy, succession, estate and inheritance taxes, and any such taxes thereon shall be paid by my Executor out of the rest of my residuary estate."

These foregoing will provisions certainly indicate the decedent's intention to accomplish a particular result and that is the payment of all such estate taxes by his residuary estate and not just by one sole 1/8th distributee. Decedent was a successful accountant, with a full knowledge of tax matters; was of substantial wealth, and drew his will with great care. See *Widener's Estate*, 81 D. & C. 106 (Pa.).

Inasmuch as said will provisions constitute a direction against the Apportionment Act and as such 50% penalty has been held to be part of the tax, as an addition to same, it should also be borne entirely by the principal of the testamentary residuary estate.

See *Mellon's Estate*, 347 Pa. 520.

In the United States Tax Court civil case there was no fraud admitted, found, or stipulated. Nor was there any Estate Tax deficiency found. On the contrary, there was a specific finding of "no deficiency in estate taxes due". Therefore, absent a deficiency there could be no additional Federal Estate tax due, and without a deficiency or a finding of fraud, there could be no lawful assessment or valid judgment for a fraud penalty in any amount.

The One-half Penalty of some $28,000.00 (being allegedly "half of the 50% addition to the Estate Tax"), stipulated and voluntarily paid by appellees under judgment of the U. S. Tax Court, per Murdock, C. J., was purported therein to have been authorized by section #3612(d)(2) of the U. S. I. R. Code. The historical note in Title 26, U. S. C. A. #3612(d)(2) shows, however, that this section derives from Section #3176, R. S., as amended by the following Acts: Mar. 1, 1879, C. 125, 20 Stat. 331; Aug. 27, 1894, C. 349, sec. 34,28 Stat. 559; Oct. 3, 1913, C. 16, secs. II, I, 38 Stat. 179; Sept. 8, 1916, C. 463, sec. 16, 39 Stat. 773; Feb. 24, 1919, C. 18, sec. 1317, 40 Stat. 1147; Nov. 23, 1921, C. 136, sec. 1311, 43 Stat. 339; Feb. 26, 1926, C. 27, sec. 1103, 44 Stat. 112, and Aug. 30, 1935, C. 829, sec. 406, 49 Stat. 1027. Said R. S. sec. #3176 was in nature a revision of Acts of June 30, 1864, C. 173, sec. 14, 13 Stat. 226; July 13, 1866, C. 184, sec. 9, 14 Stat. 101, and Dec. 24, 1872, C. 13, sec. 2, 17 Stat. 402. It is therefore quite obvious that this R. S. #3176, going back historically, as it does, to the year, 1864, antedated Federal Estate Taxes by more than half a century. Merten's "Law of Federal Gift and Estate Taxation" says: "The present Federal Tax on transfers of property at death *dates from 1916.*" This enactment was 52 years after R. S. sec. 3176 was first adopted at the close of the Civil War.

That section, now #3612(d)(2), reads, inter alia, as follows:

> "Section 3176. If any person, corporation, company, or association fails to make and file a return or list

at the time prescribed by law * * *, or makes wilfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. * * * In case a false or fraudulent return or list is wilfully made, the Commissioner shall add to the tax 50 per centum of its amount * * *."

This section #3612(d)(2) follows other apposite sections relating to the duty of collectors to canvass their districts for taxable persons and objects (26 U. S. C. A. #3600); the entry of premises for examination of taxable objects during the day or night (sec. #3601); search warrants (sec. #3602); and the making of a list or return of "articles, objects, goods, wares, and merchandise, made or sold and charged with or liable to pay any tax" (sec. #3611). From these juxtapositions, as well as from the historical derivations above-stated, long antedating the imposition of any Federal Estate Tax, it should be abundantly clear that R. S. #3176, now and in 1955 being Sec. 6653(b) of the 1954 Internal Revenue Code and being Sec. 3612(d)(2) of the 1939 Internal Revenue Code under which the court below and the U. S. Tax Court acted, is, and was then, applicable *only to excise taxes on goods, wares, and other objects*, and that it never was, by any Congressional legislation, made specifically applicable to Federal Estate Taxes. The latter application occurred only in the erring minds of some Internal Revenue agents who seem to have been so persistent in their errors and so vociferous in their mistaken demands as to have frightened the appellees into making an illegal and invalid payment of some $28,000.

Admittedly, these errors were probably induced by, and followed, the Treasury Department regulations which purported to interpret Sec. 3612(d)(2) as imposing a 50% penalty on the total tax due, rather than on the deficiency only, but it is also obvious that erroneous Treasury Depart-

ment regulations are not Congressional legislation, and cannot enlarge the impositions actually enacted by Congress.

The following appellate court cases would likewise appear to support appellant's contentions herein:

Dillon v. United States, 218 F. 2d 97; and
Berra v. United States, 221 F. 2d 590; 351 U. S. 131, 100 L. Ed. 1013, 76 S. Ct. 685.

Similarly, corroboration of appellant's views is shown by the U. S. Senate and House Committee Reports pertaining to Sec. 3612(d)(2), as found in "U. S. Code Congressional and Administrative News", vol. 3 (83rd Congress, second session), wherein, at pages 4780(K) and 4135(K), both branches say: "(1) The additions to the tax (5% for negligence or wilful disregard, and 50% for fraud) are to be *applied to deficiencies or underpayments*, and *not* to the whole tax as is *presently true* in the case of the excise taxes." Like pronouncements are repeated on page 4567 in the House Report, and on page 5241 of the Senate Report. Hence, in the case at bar, where, admittedly, there is not, and never was, any deficiency in the Estate Tax due the Government, there never was, nor could have been, any fraud, and thus no "fraud" penalty in any amount could legally be laid on this estate. Furthermore, even if such a penalty could have been lawfully imposed, it could only be adjudged for 50% of any deficiency in the tax, as paid, and inasmuch as there was no underpayment by appellant of the $112,723.10 sent to the Internal Revenue Collector with his Estate Tax return, the alleged "fraud" penalty of half the I. R. agents' claim was illegally stipulated and paid by appellees on an improper "compromise agreement" submitted by them to the U. S. Tax Court.

"Fraud" is never assumed. It must be alleged, and proved by clear and convincing evidence. As it was not admitted, stipulated, or found as a fact by the U. S. Tax Court for a necessary prop to support its judgment, the

whole basis for the alleged "penalty" was lacking, and the learned Court below could not assume its existence. Hence, its orders, founded on the presumed legality of an invalid judgment, should be reversed.

Section 3612(d)(2) of the Internal Revenue Code of 1939, to wit, "Fraud, in case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount," does not apply to estate taxes as far as the 50% of the full tax is concerned.

This provision is modified by section 871(i) of the Internal Revenue Code of 1939, which provides, as follows: "50 per cent addition treated as a deficiency. The 50 per centum addition to the tax provided by Section 3612(d)(2) shall, when assessed in connection with an estate tax, be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of Section 891 shall not be applicable" (26 U. S. C. A. 871).

This subsection is taken from Act, February 26, 1926, C. 27, § 308(j), 44 Stat. 76, which provides, "The 50 per centum addition to the tax provided by Section 3176 of the Revised Statutes, as amended, shall, when assessed after the enactment of this Act in connection with an estate tax, be assessed, collected and paid in the same manner as if it were a deficiency, except that the provisions of subdivision (h) of this section shall not be applicable."

Section 307 of said Act of 1926 defines "deficiency" to mean: "The amount by which the tax imposed by this title exceeds the amount shown as the tax by the executor upon his return: but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, refunded, or otherwise repaid in respect to such tax; or (2) * * *".

As previously claimed by petitioner the decree of apportionment directed against him is based upon error and mistakes of facts and law and failure to comply with the correct federal statutes.

Said $28,180.78 addition to the tax (or penalty) should never have been agreed to by the administrators d.b.n.c.t.a. as there was never found to be a tax deficiency upon which a penalty could be based.

Paul on Federal Estate and Gift Taxation, Vol. I, Section 13:68 (ad valorem penalties for false or fraudulent returns (page 807) states:

"The statute also provides a severe 50% penalty or addition to the tax in the case of a false or fraudulent return. This 50 percent addition to the tax is to be treated as a deficiency."

The legislative history following Section 6653(b) of the Internal Revenue Code of 1954 refers to House Report No. 1337 and Senate Report No. 1662.

The House report states:

6653. Failure To Pay Tax

"For all taxes for which returns are required, this section prescribes additions to the tax, corresponding to those of existing law relating to the income tax, for underpayments of tax resulting from negligence (5 per cent of the underpayment) or fraud (50 per cent of the underpayment). *Existing law* imposes a 50% addition in the case of fraud, applicable to *all taxes*, but in the case of *taxes other than income, estate and gift*, that addition is based on the total amount of tax imposed. Another change provided in this section is the substitution, for the penalty provided in existing law, of an amount equal to the amount of any stamp tax evaded or not paid, of an addition to the tax of 50 per cent of the total amount of the underpayment of such tax."

The Senate report states:

6653. Failure To Pay Tax

"* * * For all taxes for which returns are required, this section prescribes additions to the tax, corresponding to those of existing law relating to the income tax, for

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underpayments of tax resulting from fraud (50 per cent of the underpayment). *Existing law* imposes a 50 per cent addition in the case of fraud, applicable to all taxes, but, *in the case of taxes other than income, estate and gift*, that addition is based on the total amount of tax imposed. * * *".

Emphasis supplied by petitioner.

Here, Congress itself, has spoken as to what it actually considered the law to be, regarding such an estate tax fraud penalty, and so, it should be so interpreted by the Courts.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons evidenced by petitioner, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

WHEREFORE, petitioner prays that Writ of Certiorari be granted.

Respectfully submitted by

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